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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1981

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No:.....

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HANS BOTHKE, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE
NINTH CIRCUIT

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HANS BOTHKE
400 S.Flower LL-156
Orange,California
92668
Tel:(714) 978-2724
Petitioner,
in propria persona.

June 7,1982.

## QUESTIONS PRESENTED.

1. Whether it is legal for respondent to impose a levy on petitioner's right to conduct his business?
2. Whether it is legal for respondent to levy a tax on the earnings which provide for petitioner's existence?
3. Whether it is legal to deny petitioner the equal protection of the tax laws by denying petitioner expenses incurred and paid for the production of gross income which are granted to other persons?
4. Whether it is legal for petitioner pursuant to the U.S.Coinage Act of 1965, Section 102,and 31 U.S.C.,Section 392, i.e. to choose a legal tender thereunder?
5. Whether petitioner is entitled under the law to establish the fair market value of negotiable notes received by petitioner?

6. Whether petitioner is entitled under the law to discovery of relevant facts from the respondent (administrative agency) pursuant to administrative proceedings under the Federal Administrative Procedure Act 5 U.S.C., Section 552?

7. Whether petitioner is entitled under the law to discovery of relevant facts from the respondent under Rule 70 of the Tax Court?

8. Whether petitioner is entitled to bring before the Tax Court his legal arguments and evidence in support thereof?

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PETITION FOR A WRIT OF CERTIORARI
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OF APPEALS FOR THE NINTH
CIRCUIT

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The petitioner Hans Bothke respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on November 23,1981.

## OPINION BELOW.

The opinion of the Court of Appeals for the Ninth Circuit,not yet reported,appears in the appendix hereto.

The Tax Court Decision was entered on January 2,1980 and appears in the appendix hereto,and is reported in 39 TCM page 827 (CCH Dec.36,710(M)).

cont'd on page 3

## JURISDICTION.

The judgment of the Court of Appeals for the Ninth Circuit was entered on November 23,1981.

A timely petition for rehearing " en banc " was denied on March 16,1982, and this Petition for Certiorari was filed within ninety (90) days of that date.

This Court's jurisdiction is invoked under 28 U.S.C.Paragraph 1254(1).

cont'd on page 4.

## CONSTITUTIONAL AND STATUTORY

## PROVISIONS INVOLVED.

Fifth Amendment:

"No person shall be***deprived of life,liberty or property,without due process of law."

Ninth Amendment:

"The enumeration in the Constitution, of certain rights,shall not be construed to deny or disparage others retained by the poeple."

Tenth Amendment:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are preserved to the States,or to the poelple."

26 U.S.C.A.,Internal Revenue Code of 1954.

Section 162 :

"Trade or Business Expenses."

"There shall be allowed as a deduction all ordinary and necessary expenses

cont'd on page 5

paid or incurred during the taxable year in carrying on any trade or business."

Section 167. "Depreciation."
"There shall be allowed as a depreciation deduction a reasonable allowance for the exhaustion, wear and tear-
(1) of property used in trade or business or
(2) of property held for the production of income."

Section 212. "Expenses for the production of income."
"In the case of an individual, there shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year-
(1) for the production or collection of income;
(2) for the management, conservation, or maintenance of property held for the production of income."

The United States Coinage Act of 1965.

Public Law 89-81; 79 Stat. 254. Title 1.
Authorization of Additional Coinage.
Section 102; and
31 U.S.C. "Money and Finances."
Section 392,

Both stating that:
"All coins and currencies of the United States (including Federal Reserve Notes and circulating notes of Federal Reserve Banks and National Banking Associations) regardless of when coined or issued, shall be legal tender for all debts, public and private, public charges, taxes, duties, and dues."

Internal Revenue Regulation-CCH-Inc.
Paragraph 1.162-2.
Section 648.01. "Notes Received for Compensation."

"If notes are accepted in settlement of compensation, they are includible in gross income of a cash basis taxpayer to the extent of their fair market value when received."

Federal Administrative Procedure Act.
60 Stat.237 (1946)as amended by 80 Stat.378 (1966),81 Stat.54 (1967), 88 Stat.1561 (1974)
Title 5 U.S.C. Chapter 5.
Administrative Procedure.

Paragraph 552."Public Information."
(a) (2)
"Each agency,in accordance with published rules,shall make available for public inspection and copying-
(A) Final opinions,including concurring and dissenting opinions,as well as orders,made in the adjudication of cases;"

STATEMENT OF THE CASE.

A dispute arose between the Commissioner, the respondent herein,and Hans Bothke,the petitioner in propria persona,in regard to petitioner's 1976 income tax return.The dispute concerned the Commissioner's failure to allow to the petitioner the following:
(1)The ordinary and necessary business ex-

penses,incurred and paid for the production of gross income and claimed pursuant to the herein-above enumerated applicable sections of the Internal Revenue Code of 1954;
(2) The protection of the United States Coinage Act of 1965,Section 102,supra,and 31 U.S.C.,Section 392,supra,i.e.petitioner's right to choose a legal tender in accordance with the same to establish the fair market value and tax liability of negotiable instruments (checks)received by the petitioner as compensation for services rendered;
(3) Discovery at the administrative level in regard to petitioner's tax matters before the respondent.

The respondent in the administrative proceedings ignored petitioner's evidence and issued the Statutory Notice of Deficiency for the year 1976.

As a result of the foregoing conduct by the respondent,petitioner Hans Bothke filed

his petition in the United States Tax Court for a redetermination of the commissioner's assessment.

The jurisdiction of the Tax Court was invoked under 26 U.S.C.A.,Section 6213,I.R. Code of 1954.The respondent filed for summary judgment which was denied by the Tax Court.During the preliminary proceedings the respondent moved under Tax Court Rule 103 for a protective order relative to petitioner's discovery requests at the administrative level.The Tax Court without jurisdiction at the administrative level denied at the insistance of the respondent's attorney petitioner's discovery requests.

Petitioner moved for discovery under Tax Court Rule 70.The Tax Court based on a motion for protective order by the respondent denied petitioner his requested discovery.

The petitioner submitted in support of his position evidence consisting of testimony,exhibits,receipts and matters for the

Tax Court to judicially notice.The respondent failed to submit any contradicting evidence including of such judicially noticed matters.

The Tax Court sustained the Commissioner's assessed deficiency with minor modification. Petitioner filed his timely appeal with the Court of Appeals for the Ninth Circuit which took jurisdiction pursuant to 26 U.S. C.A.Section 7482.

The Ninth Circuit "rubber stamped" the Tax Court's decision by affirming the same without responding to the issues presented, nor citing this Court's nor any other Court's,nor any statutory or indeed any law sustaining the Ninth Circuit's authority for affirmation.

REASONS WHY THE WRIT SHOULD BE GRANTED.

1. THE DECISION OF THE NINTH CIRCUIT IN THIS INSTANT CASE CONFLICTS WITH DECISIONS OF THE U.S.SUPREME COURT, CIRCUITS 2nd,3rd,4th,6th,7th,9th, AND DISTRICT OF COLUMBIA,AND OTHER COURT'S AS TO THE PROPER INTERPRETATION OF THE CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED AS SET FORTH HEREIN-ABOVE.

Petitioner respectfully requests this Honorable Court to take judicial notice that business defined involves holding one's self out to others in selling services and embraces everything about which a person can be employed;that which occupies attention and labor of men on a regular basis,carried on in good faith for the purpose of livelihood or profit.

Baumbach v.Sargent Land Co.(1917) 61 L.Ed. 460;242 U.S.;Berry v.Koehler,(S.Ct.Idaho, 1962) 369 P.2d 1010;Cecil v.Field,(C.A.2, 1933)67 F.2d 876; Deering v.Blair,C.I.R.,

(C.A.D.C.1928)23 F.2d 975; Dogget v.Burnet, C.I.R.(C.A.D.C.1933) 65 F.2d 191;Flint v. Stone Tracy Co. 220 U.S.107,171,31 S.Ct. 342,55 L.Ed.389; Helvering v.C.I.R.,(C.A.3, 1941)124 F.2d 156;Lindner Packing & Provision Co.v.Industrial Commission of Colorado, (S.Ct.of Colorado,1936) 60 P.2d 924; Pyne v.U.S.,(Court of Claims,1940) 35 F. Supp.81; Rogers v.U.S.,(Court of Claims, 1930) 41 F.2d 865; Sloan v.C.I.R.,(C.A.9, 1933) 63 F.2d 666; and Union Trust Co,v. C.I.R.,(C.A.6,1931) 54 F.2d 199.

The above authorities demonstrate the overwhelming conflict of the Ninth Circuit Court's affirmation of the U.S.Tax Court's decision,Appendix page 5 ,in regard to petioner's status as a business person.

The petitioner's activity,engineering, involves holding himself out to others in selling his services,and embraces everything about which he is employed,occupies his attention on a regular basis,and is carried on in good faith for the purpose of livelihood and or profit and not for social diversion,which constitutes petitioner's business.

This Court has stated that business is property right;and government cannot arbi-

trarily interfere with private business or lawful occupation or impose unreasonable and unnecessary restrictions upon them. Liggett Co.v.Baldridge,278 U.S.105,and that one has the right to conduct one's business ,employment or occupation in his own way, to enter into any contract unlimited to which a person wishes to become a party without government's interference and restrictions. Hale v.Henkel,201 U.S.43 p.74, and West Coast Hotel v.Parish,300 U.S. 379, 81 L.Ed.703,57 S.Ct.578.

The Opinion of the Ninth Circuit,Appendix p. 2 ,seeks to restrict petitioner's business rights by affirming the imposition of the levy on petitioner's right to conduct his business in his own way which is of common law right.

Court's decisions on all levels reflect unanimously the interpretation of the Internal Revenue Code of 1954 Section 162,167 and 212,supra,to deduct expenses paid or

incurred in carrying on a business when the same are :Ordinary and necessary; Doggett v.Burnet,supra;C.I.R.v.Fields,[1] ,Cecil v.C.I.R.,supra;Union Trust Co.v.C.I.R., supra;

connected with trade or business;Helvering C.I.R. v.Wilmington Trust Co.,supra;Heininger v.C.I.R.,(C.A.7,1943)133 F.2d 567; and which saves the life of business; Heininger v.C.I.R.,supra.

Accordingly petitioner pursuant to overwhelming authorities is in business and entitled to deductions as claimed,which are connected and related to his business,are ordinary and necessary of engineering service, and are supported with petitioner's and his employer's testimony ,CR 42,RT 67,68;77 to 81,102 to 105,112,113,111,65,67,68,76,88 to 90,93,118,120,72,73; documentation and receipts,which remain uncontradicted by the respondent. The respondent failed to demonstrate that petitioner's gross income could have been produced without the claimed or-



1. (C.A.2,1933)67 F.2d 876.

dinary and necessary expenses.

The Ninth Circuit concurring with the U.S.Tax Court failed to take judicial notice, as requested by petitioner,of the fact that the definition "personal expenses "is not synonymous with "necessary expenses",and that for purpose of taxation there is no distinction between a "person"and a"Corporation";Department of Treasury of Indiana v.Crowder,(S.Ct.of Indiana,1938) 15 N.E.2d 89 and the term "person"means an individual, trust,estate or corporation under the Revenue and Taxation Code 26 U.S.C.A.;Mc Brier v.C.I.R.,(C.A.3,1939) 108 F 2d 967,as upheld by this Court in Helvering v.Hutchings, 313 U.S.393,(1941) 61 S.Ct.653,654,85 L.Ed. 909;and in Liggett Co.v.Baldridge,supra. Accordingly to the above authorities it is well settled that a corporation,as a person like the petitioner,deducts under the revenue Code personal expenses incurred and paid for the production of the gross income,

pursuant to Section 162,26 U.S.C.A.supra. These facts have been acknowledged by the Tax Court in this instant case in CR 42,RT 61. It necessarily follows that the Ninth Circuit's opinion,Appendix P. 2 ,declaring all petitioner's claimed business expenses as "personal living expenses in order to deny the deduction of the same,when in fact the same type expenses are granted to other businesses, is not supported with any authority relative to the facts in this case,and is in conflict with this Court's holdings, the 2nd,4th,6th,Distr. of Col. and the 7th circuit in Heininger v.C.I.R.,supra,wherein the Court clearly effectuated the prevailing policy under 26 U.S.C.A.Section 162,167,212, supra,by stating: "If the deduction in the case at bar was not an ordinary and necessary expense to the "carrying on"of the business,we are unable to understand the english language. Without this expense,there would have been no business.Without the business there would have been no income.Without the income,there would have been no tax. To say that this expense is not ordinary and necessary is to say

that that which gives life is not ordinary and necessary."

The Ninth Circuit's opinion,Appendix p.2, affirms also the respondent's action to tax petitioner's livelihood,specifically the monies earned by petitioner providing for his existence and support,which enable him to earn and to produce his gross income. Based on the rights guaranteed by the Fifth Amendment,the right to work and to live freely,without government restriction with a tax on livehood,the Ninth Circuit's oppinion,App. p.2,constitutes an overstepping of its power and authority and is in conflict with decisions rendered throughout the century establishing that "Livelihood"means necessary provisions,support,food on which one subsists;the goods which maintain one; Succession of Moise,(S.Ct.Louis.1902)31 So. 990;Dunnavant v.State Soc.Sec.Comm.of Missouri,(C.A.Missouri,1941)150 S.W.2d 1103; 54 C.J.S.page 636,or as held in State v. Shouse,(S.Ct.Missouri,1916)186 S.W.1064, that"the words necessary

food,clothing or lodging means such as is requesite to sustain life and health,and lacking-which the life will be endangered, or its health permanently injured,or likely to be."
The court continued by stating:
"We think nothing other could have been intended by the legislature."

Which was upheld by the Supreme Court of Appeals in Snyder v.Lane,(W.Va.1951) 65 S. E.2d 483 holding that:

" Maintenance"and "Support"mean necessaries of life and means of livelihood and include but are not limited to food-shelter,clothing and medical care;Necessaries consist of whatever naturally and reasonably tends to relieve distress, to promote comfort either of body and mind."

The Supreme Court of Oregon in Redfield v. Fisher,(1930) 292 P.813;also upheld the Fifth Amendment rights by stating:

"The individual,unlike the corporation, cannot be taxed for the mere privilege of existing;**** and the individual's rights to live and own property are natural rights for the enjoyment of which an excise cannot be imposed."

Upheld also in Sims v.Ahrens,217 S.W.720, including the therein referred to landmark decisions,stating: "Our Constitution not

only protects the life,liberty and property of the poeple,but protects them as well in respect to their occupations or means of support."

Which is in perfect harmony with this Court's Decision in Adams v.Tanner,244 U.S.590, (Ann.Cas.1917D,973,L.R.A.1917 F,1163,61 L. Ed.1336,37 Sup.Ct.Rep.662) Holding:

"You take my House when you do take the prop that doth sustain my House; You take my life when you do take the means whereby I live!"

The foregoing authorities established that the Ninth Circuit's opinion,Appendix p. 2 , and the Tax Court's decision,Appendix p. 5, reported in 39 TCM,Dec,36,710 (M),declaring a tax on petitioner's livelihood and existence as proper,stands alone in a serious conflict with this Court's and all other authorities decisions,is not based on any law or fact and has no credibility;
But if upheld by this Court shall seriously affect every human's right in this country, namely the right to live without interference and restriction by government imposing a

tax on livelihood,in violation of the Sixteenth Amendment which authorizes a tax on income,profits and gains,but not on livelihood and existence.The Ninth Circuit's opinion,Appendix p. 2,declares the rights to live freely as granted under the Fifth Amendment as null and void and enslaves petitioner to the government for which no authority exists,and this conduct is best described with the words of our founding fathers: "Where law ends tyranny begins."

This Court is respectfully requested to take judicial notice of another bizzare legal decision of the U.S.Tax Court in Jeffrey Edmondson v.C.I.R.,(see Appendix p. 6 ,citation is requested and will be submitted when available) wherein the court blessed the illegal drug dealings of the therein named petitioner by declaring the cost of buying amphetamines,cocaine and marijuana and related costs for phone,transportation,packing,apartment rent,and scale

for weighing the wares,as ordinary and necessary business expenses.

U.S.Senator Bill Armstrong defined the conduct of the Tax Court as"an insult to all honest taxpayers." or as Sid Taylor,research Director of the National Taxpayers Union explained: "Deductions for criminals like this makes dopes out of taxpayers. It's crazy.It's like a holdup man deducting his bullets for tax purposes."

Based on the forementioned Tax Court decision in conjunction with the decision in this instant case,this Court's authority and supervision is most urgently required to determine for the sake of human welfare what constitutes ordinary and necessary business expenses; the expenses incurred by a drug dealer,to destroy life? Or the expenses incurred by a law abiding taxpayer,to sustain life?

In absence of any specific,specified legal tender in the Internal Revenue Code of 1954,the authority of the United States

Coinage Act of 1965,Section 102,supra,and 31 U.S.C. Section 392,supra,Acts of Congress, define the official legal tenders of the United States;and in conjunction with the rights granted under the Ninth and Tenth Amendment,supra,it is petitioner's right to choose a legal tender to establish the fair market value of received negotiable notes, checks,and their tax liability.

The fact that petitioner had received,property,negotiable notes ,checks,was acknowledged in the Ninth Circuit's opinion,App. p. 2 ,

This Court has judicially noticed and upheld the Tax Court's,6th and Distr.of Col.'s decision that: "A taxpayer must take into account property(negotiable notes, checks)received in lieu of cash to the extent of their fair market value."

Potter v.C.I.R.(1946) 5 TCM,15,o26 (M); Cherokee Motor Coach Co.v.C.I.R.,(C.A.6, 1943)135 F 2d 840; and Schlude v.C.I.R., 83 S.Ct.606,(1963) 372 U.S.128,Foot note 10) Upholding Internal Revenue Regulation Para.

1.162-2,Section 648.01 and the therein established policy to do so.

Accordingly the opinion Appendix p. 2 ,of the Ninth Circuit stands alone in overwhelming conflict with this Court's authority and others,and it is the right of petitioner under the law to establish the fair market value of negotiable notes,checks,received for services rendered.

This serious conflict justifies the grant of Certiorari to review the unsupported judgment of the Ninth Circuit.

2. THE JUDGMENT OF THE NINTH CIRCUIT IN THIS INSTANT CASE IS IN CONFLICT WITH THIS COURT'S DECISIONS RELATIVE TO FUNDAMENTAL REQUIREMENTS TO DUE PROCESS.

This Court held in Re Murchison,349 U.S. 133,99 L.Ed.942,75 S.Ct.623 that:

> "The fairness requisite to due process requires an absence of actual bias in the trial of cases."

The Tax Court judges involved in this instant case have addressed petitioner in

open court by stating:

> "Now,Mr.Bothke,if I may give you some advise.I think that what you need to do is to forget about these strong legal arguments which you are making;"
> (Emphasis added) ( CR 21,RT 29)

In the judicial system strong legal arguments prevail,which should be noticed by this Court,in absence of any submitted by the respondent.

Six days before the trial the Tax Court in open court made the following threatening statements to the petitioner:

> "I think that the time and effort that you have devoted up to this point to what you think are violations in the administrative process would not serve you advantageously if you pursue those at the trial,because what I am interested in is,do you really owe any of this tax?" (CR 42(6-13-79)RT 30,31).

The above statements reveal the none importance of procedural due process in the Tax Court and the affirmation of the same by the Ninth Circuit is in conflict with this Court's decision in Baltimore & O.R.Co. v. U.S.,298 U.S.349,80 L.Ed.1209,56 S.Ct.797,

wherein this Court held: "The right under the due process clause to a full hearing includes the right of the party whose rights are sought to be affected to introduce evidence,and have judicial findings upon it."

The Tax Court denied during the proceedings petitioner's discovery request taken on the administrative level,without jurisdiction based on a Motion for Protective order filed by the respondent.(CR Exh.4;CR 5,27 & 23) Thereby denying petitioner the protection of the 5 U.S.C.,Section 552,Para.(a)(2)(A),supra,to obtain the final opinion of the Appellate Division Hearing,to which pursuant to law the petitioner is entitled to.

Petitioner was compelled to file suit under the Freedom of Information Act in the District Court CV-79-1465 LTL(PX).Subsequent filing the suit,the trial attorney in this instant case of the respondent,in need of an excuse by now releasing the sought opinion of the Appellate Division submitted in the District Court under penalty of perjury the statement: "I released these docu-

ments as a part of the Tax Court discovery process." (Exhibit H,attached to petitioner's Opposition to the Commissioner of I.R.S's Memorandum,filed with the Ninth Circuit Nov.3,1980.)

The trial attorney of the respondent in this instant case submitted the forementiond perjured statement willfully into the record relative to this instant case,because it was she,who had filed the Motions of protective orders in the tax court relative to the requested discovery on the administrative level and on the tax court level which the Tax Court all denied.

The Tax Court was duly informed by petitioner about the respondent's committed perjury and the violation of the Tax Court's Rule 201(a) but took no corrective action.

This Court is respectfully requested to take judicially notice of the facts in the Congressional Directory of 1977,which states that one judge involved in this instant case served 12 years with the I.R.S. before becomming tax court judge,and the other

served 20 years with the Department of Justice,Tax Division,prosecuting tax cases for the government. In view of the foregoing presented facts,the intimidating statements of the Tax Court,the preconceived opinion and inclination to decide the cause against petitioner without contradicting evidence submitted by the respondent,the Tax Court's mind was not open perfectly to conviction,and was biased.

The Ninth Circuit's opinion,App.p. 2 , affirming the lower court's violations of due process,inspite of being fully informed about the same,is in serious conflict with this Court's decision in Johnson v.Mississippi,403 U.S.212,29 L.Ed.2d 423,91 S.Ct. 1778 holding that:

> "Trial before an unbiased judge is essential to due process."

Accordingly this Court's supervision and authority in this conflict is urgently needed in the interest of justice,since a judgment not based on due process of law is

null and void.

3. THE DECISION OF THE NINTH CIRCUIT RAISES SIGNIFICANT AND RECURRING PROBLEMS CONCERNING EFFORTS TO INVOKE THE CONSTITUTIONAL AND STATUTORY PROVISIONS AS SET FORTH HEREIN.

The Ninth Circuit's opinion in this instant case reflects the important constitutional, statutory and policy considerations growing out of bonafide efforts to invoke the rights thereunder.

This square and irreconcilable decision of the Ninth Circuit,Appendix p. 2 ,:

(1) misapplied and misconstrued prior applicable Supreme Court decisions;(see table of cases.)

(2) is in conflict and inconsistent with other circuits and highest State Courts; (see table of cases.)

(3) demonstrates an intra circuit conflict between Sloan v.C.I.R. supra,and this instant case;

(4) involves application of the Federal Constitution Fifth,Ninth,and Tenth Amendment; Federal Statutes U.S. Coinage Act of 1965, The I.R.Code of 1954,26 U.S.C. Sections 162,167 & 212 and Regulation 1.162-2; 5.U.S.C.,Section 552 and 31 U.S.C.,Section 392 and the rights privileges and immunities guaranteed thereunder;

(5) involves important issues to the public, specifically the common law right to live and to work without imposed restrictions by government with a tax upon livelihood;

(6) constitutes grave power annulling Acts of Congress 5th,9th,10th,amendments,U.S. Coinage Act,Title 5 and 26 the applicable Section as set forth,and 31 U.S.C. Section 392;

(7) is one of continuing importance under the revenue act causing possible wide spread litigations by setting a precedent;

(8) is totally avoid of evidentiary support;

(9) has so far departed from the accepted

and usual course of judicial proceedings by sanctioning such course of a lower court; (10) represents a gross miscarriage of justice;

and calls for an exercise of this Court's power of supervision to assure continuing efforts to invoke the constitutional and statutory provisions as set forth herein.

The refusal of the Ninth Circuit to respect the herein set forth authorities and its own,and the action of that court in reviewing the record de novo and upholding such miscarriage of justice by the lower court,cannot be justified.

CONCLUSION.

For these reasons,a writ of certiorari should issue to review the judgment and opinion of the Ninth Circuit.

RESPECTFULLY SUBMITTED,

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